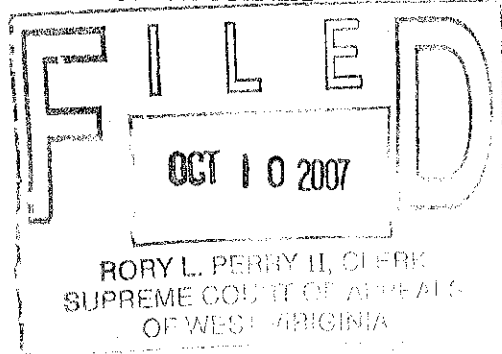


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON
Appeal No. 33514**



IN RE THE MARRIAGE OF:

**CONNIE SUE WHITESIDE
n/k/a Connie Sue Varney,**

Appellant,

v.

Appeal to Circuit Court of Kanawha County
Civil Action No. 01-D-179
From the Family Court of Kanawha County
Civil Action No. 01-D-179

**MICHAEL B. WHITESIDE and
EQUITY HOLDINGS, LLC,**

Appellees.

REPLY BRIEF OF APPELLANT CONNIE SUE VARNEY

**CONNIE SUE WHITESIDE
n/k/a Connie Sue Varney,
By Counsel,**

Steven L. Thomas, Esq. (WVSB # 3738)
Thomas H. Ewing, Esq. (WVSB # 9655)
KAY, CASTO & CHANEY PLLC
PO Box 2031
Charleston, WV 25327
(304) 345-8900

Connie Sue Whiteside, n/k/a Connie Sue Varney, by counsel, offers this Reply Brief in support of her Appeal:

DISCUSSION OF LAW

This appeal concerns whether Equity Holdings is entitled to the protection afforded a bona fide purchaser without notice under W. Va. Code § 48-7-108. In the Family Court below and in her Appeal Brief, Ms. Varney has argued that Michael B. Whiteside's transfer of his one-half interest in lots 62, 63, 64, 95 and 96 located at Wildwood Addition, Charleston, Kanawha County, West Virginia (the "Property") to Equity Holdings is voidable because Equity Holdings had actual knowledge of Ms. Varney's claims and therefore cannot be a bona fide purchaser. In response, Equity Holdings argues that, although it admittedly knew that Ms. Varney had asserted claims against Mr. Whiteside and his interest in the Property in the context of the pending Whiteside divorce action, it was a bona fide purchaser because no equitable distribution order had been entered and no notice of lis pendens had been filed at the time of the transfer. For the reasons set forth below, these arguments fail to give support to the Family Court's legal conclusion that Equity Holdings was a bona fide purchaser without notice of Ms. Varney's claims under W. Va. Code § 48-7-108.

A. Equity Holdings Had Knowledge of Sufficient Facts and Circumstances to Disqualify It From Being a Bona Fide Purchaser.

In its brief, Equity Holdings asserts that actual knowledge of the pending Whiteside divorce action and Ms. Varney's claims against Mr. Whiteside and the Property, prior to the sale of the Property, does not prohibit it from being a bona fide purchaser. Instead, Equity Holdings claims that it was a bona fide purchaser because no equitable distribution order was entered nor was a notice of lis pendens filed. Contrary to Equity Holdings' argument, the fact that no order

was entered nor notice of lis pendens filed is irrelevant to the issue of whether Equity Holdings was a bona fide purchaser under W. Va. Code § 48-7-108.

In its entirety, section 48-7-108 reads as follows:

As to any third party, the doctrine of equitable distribution of marital property and the provisions of this article shall be construed as creating no interest or title in property until and unless an order is entered under this article judicially defining such interest or approving a separation agreement which defines such interest. Neither this article nor the doctrine of equitable distribution of marital property shall be construed to create community property nor any other interest or estate in property except those previously recognized in this state. *A husband or wife may alienate property at any time prior to the entry of an order under the provisions of this article or prior to the recordation of a notice of lis pendens in accordance with the provisions of part 7-401, et seq., and at anytime and in any manner not otherwise prohibited by an order under this chapter, in like manner and with like effect as if this article and the doctrine of equitable distribution had not been adopted: Provided, That as to any transfer prior to the entry of an order under the provisions of this article, a transfer other than to a bona fide purchaser for value shall be voidable if the court finds such transfer to have been effected to avoid the application of the provisions of this article or to otherwise be a fraudulent conveyance.* Upon the entry of any order under this article or the admission to record of any notice with respect to an action under this article, restraining the alienation of property of a party, a bona fide purchaser for value shall take such title or interest as he or she might have taken prior to the effective date of this section and no purchaser for value need see to the application of the proceeds of such purchase except to the extent he or she would have been required so to do prior to the effective date of this section: Provided, however, That as to third parties nothing in this section shall be construed to limit or otherwise defeat the interests or rights to property which any husband or wife would have had in property prior to the enactment of this section or prior to the adoption of the doctrine of equitable distribution by the supreme court of appeals on the twenty-fifth day of May, one thousand nine hundred eighty-three: Provided further, That no order entered under this article shall be construed to defeat the title of a third party transferee thereof except to the extent that the power to effect such a transfer of title or interest in such property is secured by a valid and duly perfected lien and, as to any personal property, secured by a duly perfected security interest.

W. Va. Code § 48-7-108 (emphasis added).

Under this section, it is undisputed that a husband or wife has the right to sell property to a bona fide purchaser at any time prior to the entry of an equitable distribution order or prior to

the recordation of a notice of lis pendens. However, the section also includes an exception that limits the absolute right to alienate marital property. *Id.* The section specifically states “[t]hat as to *any* transfer *prior to the entry of an order* under the provisions of this article, a transfer other than to a bona fide purchaser for value shall be voidable” if the conveyance was to avoid equitable distribution or was otherwise fraudulent. *Id.* The key points of the exception are that (1) it applies to “any” transfer regardless of whether a notice of lis pendens was filed or not, *see id.*,¹ and (2) only transfers to bona fide purchasers are protected. When this section is read in its entirety, it is clear that the exception sets forth the consequences when a third party accepts a transfer of property during a divorce action with knowledge of a wife’s claims: the third party is not a bona fide purchaser for value and the transfer may be voided for the reasons specified therein.²

The facts in the record demonstrate that Equity Holdings had (1) notice of the pending Whiteside divorce action; (2) that Ms. Varney was asserting claims against Mr. Whiteside, and (3) she intended to credit her claims against Mr. Whiteside in her bid for the Property in the

¹ As this Court has previously held, “[t]he word ‘any’, when used in a statute, should be construed to mean any.” Syl. Pt. 2, *Thomas v. Firestone Tire & Rubber Co.*, 266 S.E.2d 905 (W. Va. 1980); *see also Hose v. Berkeley County Planning Comm’n*, 460 S.E.2d 761, 765 (W. Va. 1995).

² This Court has explained that

“[a] bona fide purchaser is one who actually purchases in good faith.” Syl. pt. 1, *Kyger v. Depue*, 6 W. Va. 288 (1873). We have also described a bona fide purchaser of land as “one who purchases for a valuable consideration, paid or parted with, **without notice of any suspicious circumstances to put him upon inquiry.**” *Stickley v. Thorn*, 87 W. Va. 673, 678, 106 S.E. 240, 242 (1921) (quoting *Carpenter Paper Co. v. Wilcox*, 50 Neb. 659, 70 N. W. 228 (1897)). *See also Simpson v. Edmiston*, 23 W. Va. 675, 680 (1884) (“[A] bona fide purchaser is one who buys an apparently good title **without notice of anything calculated to impair or affect it.**”); *Black’s Law Dictionary* 1249 (7th ed.1999) (defining a bona fide purchaser as “one who buys something for value without notice of another’s claim to the item or of any defects in the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”).

Subcarrier Communs., Inc. v. Nield, 624 S.E.2d 729, 737 (W. Va. 2005) (emphasis added).

bankruptcy court.³ Moreover, the circumstances surrounding the sale and Mr. Whiteside's cover-up of the sale after the fact provide evidence that Mr. Whiteside transferred the Property to deprive Ms. Varney of any equitable distribution rights in his one-half interest.⁴ For example, the Bankruptcy Trustee advised the Bankruptcy Court that he had concerns about what Equity Holdings was trying to do and that Mr. Whiteside was putting pressure on people to get it done. (Bankruptcy Hearing Transcript ("Transcript") at 18). Additionally, Mr. Whiteside's misrepresentations to the Family Court that he still retained possession of the Property during the January 5, 2005 final hearing provides support that he was attempting to conceal his actions.

The events leading up to the sale gave Equity Holdings actual knowledge, not merely regarding the Whiteside divorce, but also that Ms. Varney was asserting a claim relating to this Property as part of the divorce. Given this, the only conclusion is that Mr. Whiteside was attempting to deprive Ms. Varney of her equitable rights to his interest in the Property. This evidence clearly demonstrates that Equity Holdings had sufficient knowledge of facts and circumstances to impose a duty to inquire into Ms. Varney's claims against Mr. Whiteside. In this context, the fact that no equitable distribution order had been entered nor notice of lis

³ It is important to realize that Ms. Varney acted in the bankruptcy to preserve and protect her interest in the Property. Because of the procedural context in the bankruptcy court, Ms. Varney's action was to submit an upset bid and an offset. By asserting her right to credit her bid for the Property against her claims against Mr. Whiteside, Ms. Varney was asserting her right to equitable distribution. The use of the term equitable distribution was not the appropriate characterization in the bankruptcy context dealing with a proposed trustee sale. Instead, Ms. Varney made her credit bid for the Property.

⁴ While fraud must be clearly proved by him who alleges it, it is not necessary that it should be expressly shown. It is rare that it can be. The participants are not apt to discuss it, but actions speak louder than words, and the transaction itself often furnishes proof of the fraud that is entirely satisfactory. Hazlewood v. Forrer, 94 Va. 703, 27 S.E. 507; Todd v. Sykes, 97 Va. 143, 33 S.E. 517. Where the fraud of a grantor in a deed, or of a seller of personal property, has been clearly shown, and it is sought to charge the grantee or purchaser with guilty knowledge, it is not necessary to prove that the latter had positive knowledge of such fraudulent intent. It is sufficient if he has knowledge of such facts and circumstances as would have excited the suspicion of a man of ordinary care and prudence, and put him upon such inquiry as to the bona fides of the transaction as would necessarily have led to the discovery of the fraud of the grantor or seller. American Net, etc., Co. v. Mayo, 97 Va. 182, 33 S.E. 523; Anderson v. Mossy Creek Co., 100 Va. 420, 41 S.E. 854; Flook v. Armentrout, 100 Va. 638, 42 S.E. 686. Crowder v. Crowder, 99 S.E. 746, 749 (Va. 1919)

pendens filed is irrelevant.⁵ The circumstances dictate that Equity Holdings should have inquired regarding the extent of Ms. Varney's claims and Mr. Whiteside as to his motives for pushing the sale. Equity Holdings cannot now claim to be a bona fide purchaser when it failed to take these simple actions. The record shows that Equity Holdings had actual notice of facts and circumstances that deprive it of being a bona fide purchaser in this instance.

B. Because Equity Holdings Had Actual Knowledge of Ms. Varney's Claims, It Cannot Be a Bona Fide Purchaser Under W. Va. Code § 48-7-108

Equity Holdings maintains that it was only required to inquire into whether an order regarding equitable distribution was entered and whether a notice of lis pendens was filed, to qualify as a bona fide purchaser under W. Va. Code §48-7-108. This argument completely ignores the fact that a person with actual knowledge of claims relating to property cannot qualify as a bona fide purchaser of that property. See Belcher v. Powers, 212 W. Va. 418 573 S.E.2d 12 (2002)(“a party is not entitled to protection as a bona fide purchaser, without notice, unless he looks to every part of the title he is purchasing, neglecting no source of information respecting it which common prudence suggests”); Highway Properties v. Dollar Savings Bank, 189 W. Va. 301 431 S.E.2d 95 (1993) (“whatever is sufficient to direct the attention of a purchaser to prior rights and equities of third parties, so as to put him on inquiry and to ascertaining their nature, will operate as notice.”) See also In re Reasonover, 236 B.R. 219 (Bankr. E.D. Va. 1999)(to obtain the status of a “bona fide purchaser” under Virginia Law, one must have neither actual nor constructive notice of any defects in the chain of title.)

The essential purpose of the exception in section 48-7-108 is to protect one spouse from being deprived or defrauded of her equitable distribution rights by the other spouse. This purpose is consistent with the law prior to the 2001 effective date of section 48-7-108. See Syl. Pt.,

⁵ Equity Holdings claims that this is all that it had to do once it had notice of the divorce and the claims that Ms. Varney were making relative to the property.

Wallace v. Wallace, 291 S.E.2d 386 (W. Va. 1982) (“Spouses are protected from acts before, during or after marriage that are intended to deprive them of part of their marital partners' estates upon which to base claims for support.”); Jones v. Jones, 345 S.E.2d 313, 318 (W. Va. 1986). Therefore, to qualify as a bona fide purchaser under the statute, a person must lack actual knowledge of the potential rights and claims of a spouse. Actual knowledge of a wife’s intent to offset her claims against her husband’s interest in property necessarily implies that a conveyance of that property is intended to avoid equitable distribution. Common sense and fairness dictate that, if the transferee has knowledge or information that the conveyance is being made to deprive the spouse of his or her rights or to otherwise perpetrate some fraud, then it is impossible for the transferee to be a good faith purchaser.

Equity Holdings’ argument ignores the distinction between actual notice and constructive notice. Constructive notice is a substitute for actual notice and is therefore irrelevant when a party has actual notice as is the case here with Equity Holdings. Because it had actual notice, Equity Holdings cannot argue that it was a bona fide purchaser for value simply because no notice of lis pendens relating to the divorce action was filed. Equity Holdings had actual knowledge not merely regarding the pending Whiteside divorce action, but also that Ms. Varney was asserting claims against Mr. Whiteside and his interest in the Property. Given this, there is only one possible conclusion: Mr. Whiteside made this conveyance to avoid Ms. Varney’s right to equitable distribution. Cf. Wolfe v. Alpizar, 637 S.E.2d 623, 627 (W. Va. 2006) (emphasis added). (A “party *without actual notice* may rely upon record titles in the office of the clerk of the county commission . . .”). See First Midwest v. Pogge, 687 N.E.2d 1195, 1198-99 (Ill. App. Ct. 1997) (“It would be inconsistent to bind those with constructive notice of the pending action but not those with actual notice.”); Breeding v. NJH Enters., LLC, 940 P.2d 502, 504 (Okla.

1997); First Ala. Bank of Tuscaloosa, N.A. v. Brooker, 418 So. 2d 851, 856 (Ala. 1982); see also Breeding, 940 P.2d at 505 (emphasis added) (“The filing requirements of the lis pendens statute protect those without actual notice of the litigation from the sometimes harsh consequences of taking an interest in property during the pendency of litigation that may affect title to the property. *Those with actual knowledge of litigation may not rely on a failure to give notice of that which they already know.*”).

C. The Court Should Reverse the Family Court’s Decision, Because the Conveyance Was Effected to Avoid Equitable Distribution.

Based on the undisputed facts, Equity Holdings had actual knowledge of the Whiteside divorce action, Ms. Varney’s claims against Mr. Whiteside and intent to offset those claims against his interest in the Property. These facts support only one conclusion: Mr. Whiteside made this conveyance to defeat Ms. Whiteside’s right to equitable distribution. At a minimum, Equity Holdings had notice of suspicious circumstances to impose a duty to inquire as to Ms. Varney’s claim to Mr. Whiteside’s interest in the Property as part of the divorce settlement.⁶ Although Equity Holdings asserts that Ms. Varney’s claim described at the bankruptcy hearing was vague and unspecific, it was undeniably asserted. Equity Holdings did not so much as ask Ms. Varney for any clarification or elaboration. Given this actual knowledge, Equity Holdings had a duty to further inquire based on the pending divorce and the claims described at the bankruptcy hearing. Therefore, the Family Court erred in finding that Equity Holdings was a bona fide purchaser.

⁶ Equity Holdings has admitted that it had “scant” knowledge of Ms. Varney’s claims. Even “Scant” knowledge would impose upon Equity Holdings a duty for further inquiry. For example, Equity Holdings could have simply contacted counsel for Ms. Varney to ascertain a more detailed explanation of the claim. This was not done. Equity Holdings could have examined the documents filed in the divorce action. There is no evidence in the record that Equity Holdings did so beyond seeing if an order regarding equitable distribution was entered. In short, all that Equity Holdings has claimed that it did was see if an order was entered and check the records for a notice of lis pendens.

The purpose of the exception in W. Va. Code § 48-7-108 is to protect innocent spouses, like Ms. Varney, from being deprived of their rights in their marital partners' estates. Cf. Wallace, 291 S.E.2d at Syl. Pt. The Family Court did not make any findings relative to Mr. Whiteside's intention in transferring the Property. Ms. Varney respectfully suggests that none is necessary. Mr. Whiteside's transfer of his interest in the Property eliminated the assets of the marital estate subject to equitable distribution. Thus, the effect of the transfer was that Ms. Varney was denied equitable division of the parties' marital property as was provided for in the Family Court's Final Order dated February 1, 2005. Given the undisputed facts, only one conclusion is possible: Mr. Whiteside conveyed his interest in the Property to defeat Ms. Varney's claim for equitable distribution.

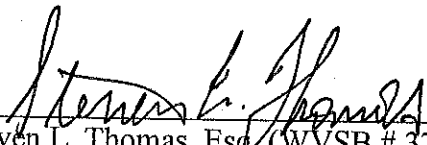
The record before the Court shows that Equity Holdings cannot possibly be a bona fide purchaser because it had actual knowledge of the Whiteside divorce action, actual knowledge of Ms. Varney's claims against Mr. Whiteside and actual knowledge of her intent to credit her claims against Mr. Whiteside against his interest in the Property. Thus, this Court should reverse the Family Court's Order dated November 29, 2006, and set aside the transfer of the Property to Equity Holdings pursuant to W. Va. Code §48-7-304, thus giving effect to the Family Court's Final Order dated February 1, 2005. Alternatively, the Court should remand the matter to the Family Court for a determination regarding Mr. Whiteside's intention in the transfer to deprive Ms. Varney of her right to equitable distribution.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, based upon the foregoing, Connie Sue Varney respectfully requests that the Court reverse the Family Court's Order of November 29, 2006, set aside Michael B. Whiteside's July 23, 2004, transfer of his one-half interest in lots 62, 63, 64, 95 and 96 located at

Wildwood Addition, Charleston, Kanawha County, West Virginia, to Equity Holdings, and enforce the Family Court's Final Order dated February 1, 2005. Alternatively, Ms. Varney asks the Court to remand the case to the Family Court for a determination as to whether Mr. Whiteside transferred the Property to deprive Ms. Varney of her right to equitable distribution or otherwise acted fraudulently.

Respectfully submitted,
CONNIE SUE WHITESIDE
n/k/a Connie Sue Varney,
By Counsel,


Steven L. Thomas, Esq. (WVSB # 3738)
Thomas H. Ewing, Esq. (WVSB # 9655)
KAY, CASTO & CHANEY PLLC
PO Box 2031
Charleston, WV 25327
(304) 345-8900

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON
Appeal No. 33514

IN RE THE MARRIAGE OF:

CONNIE SUE WHITESIDE
n/k/a Connie Sue Varney,

Petitioner,

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Appeal to Circuit Court of Kanawha County
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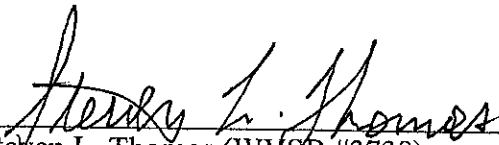
Respondents.

CERTIFICATE OF SERVICE

I, STEVEN L. THOMAS, hereby certify that on the 10th day of October, 2007, I personally served the foregoing **REPLY TO BRIEF OF APPELLEE, EQUITY HOLDINGS, LLC** upon the Respondents or counsel their counsel, by first-class mail at the following address:

Michael B. Whiteside
310 Wise Drive
Malden, WV 25306
Pro Se

W. Bradley Sorrells, Esq.
Robinson & McElwee PLLC
P.O. Box 1791
Charleston, WV 25326
(304) 344-5800
Counsel for Equity Holdings, LLC


Steven L. Thomas (WVSB #3738)